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In The

Supreme Court of the United States

October Term, 1976

No. 76-1308

RICARDO WOODS and ROLAND REAVES,
Petitioners,

—v.—

STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI, AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI, OF THE AMERICAN CIVIL LIBERTIES UNION OF OHIO FOUNDATION, INC.

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In The
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-vs-

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TO THE SUPREME COURT OF OHIO

Motion for Leave to File Brief
Amicus Curiae In Support of Petition
For Writ of Certiorari and
Statement of Interest of Amicus Curiae

The American Civil Liberties Union of Ohio Foundation, Inc., respectfully moves this Court, pursuant to Supreme Court Rule 42(1), for permission to file the attached brief amicus curiae in support of granting the petition for a writ of certiorari. The interest of Amicus Curiae as well as the reasons supporting the motion are set out in the following paragraphs. If the petition for a writ of certiorari is granted,

Amicus further moves, pursuant to Supreme Court Rule 42(2), for permission to file a brief amicus curiae on the merits in support of Petitioners.

(1) The American Civil Liberties Union of Ohio Foundation, Inc. (Foundation) is the separate litigative and educational arm of the American Civil Liberties Union of Ohio (Union). Both the Foundation and the Union are affiliated with the American Civil Liberties Union. The parent and its affiliates comprise a nationwide organization of approximately 400,000 members dedicated to the protection of the rights enumerated in the Bill of Rights, and have been actively involved in the death penalty controversy in judicial, legislative and educational forums in Ohio and elsewhere.

(2) Petitioners are two of more than seventy persons who have been sentenced to death under Ohio's new death sentence scheme. Petitioners are two of the nineteen persons whose death sentences have been affirmed by the Ohio Supreme Court. Any decision to grant or deny the petition for a writ of certiorari must take account of the statutory structure of Ohio's death sentence scheme, the judicial gloss that has been placed upon it by the Ohio Supreme Court, the manner in which that gloss has been applied, and certain aspects of Ohio's substantive law of crimes. As a result of its general concern about the death penalty and its specific involvement in Ohio death cases other than the case at bar, Amicus is uniquely suited to illuminate these issues in greater detail than appears in the Petition.

(3) Counsel for Petitioners has consented to the filing of the attached brief. He has also consented to the filing of an amicus brief on the merits if the petition is granted. The present motion is necessitated because counsel for the State of Ohio has refused consent.

WHEREFORE, movant prays that the attached brief amicus curiae in support of the petition for a writ of certiorari be permitted to be filed with the Court, and that, if the petition is granted, movant be granted permission to file a brief amicus curiae on the merits in support of Petitioners.

Respectfully submitted,

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BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I N D E X

	PAGE
Interest of Amicus Curiae	1
Questions Presented	1
Introductory Statement	2
Reasons for Granting the Writ	8
Conclusion	24

TABLE OF AUTHORITIES

Cases:

Bouie v. City of Columbia, 378 U.S. 347 (1964) 24

Furman v. Georgia, 408 U.S. 238 (1972) 16, 18, 20, 21

Gardner v. Florida, 45 U.S. L.WEEK 4275 (U.S. March 22, 1977) 22

Gregg v. Georgia, 96 S. Ct. 2909 (1976) 9, 16, 18, 20

McGautha v. California and Crampton v. Ohio, 402 U.S. 183 (1971) 20

Mullaney v. Wilbur, 421 U.S. 684 (1975) 19, 20

Proffitt v. Florida, 96 S. Ct. 2960 (1976) 16, 21, 22

Roberts v. Louisiana, 96 S. Ct. 3001 (1976) 9, 11, 15

Roberts v. Louisiana, #76-5206 15

	PAGE
State v. Bates, 48 Ohio St.2d 315, 358 N.E.2d 554 (1976)	5
State v. Bayless, 48 Ohio St.2d 73, 357 N.E.2d 1035 (1976)	4, 6, 13, 20
State v. Bell, 48 Ohio St.2d 270, 358 N.E.2d 556 (1976)	4, 10, 13
State v. Black, 48 Ohio St.2d 262, 358 N.E.2d 551 (1976)	4, 13
State v. Cliff, 19 Ohio St.2d 31, 249 N.E.2d 823 (1969)	21
State v. Edwards, 49 Ohio St.2d 31, 358 N.E.2d 1051 (1976)	5, 13, 20
State v. Hall, 48 Ohio St.2d 325, 358 N.E.2d 590 (1976)	5
State v. Hancock, 48 Ohio St.2d 147 358 N.E.2d 273 (1976)	4
State v. Harris, 48 Ohio St.2d 351, 359 N.E.2d 67 (1976)	5, 13
State v. Lane, 49 Ohio St.2d 77, 358 N.E.2d 1051 (1976)	5
State v. James Lockett, 48 Ohio St.2d 71, 358 N.E.2d 1077 (1976)	4
State v. Sandra Lockett, 48 Ohio St.2d 391, 358 N.E.2d 623 (1976)	5
State v. Miller, 49 Ohio St.2d 198, _____ N.E.2d ____ (1977)	5
State v. Osborne, 49 Ohio St.2d 135, 359 N.E.2d 78 (1976)	5

PAGE

State v. Perryman, 49 Ohio St.2d 14, 358 N.E.2d 1040 (1976) 5

State v. Roberts, 48 Ohio St.2d 221, 358 N.E.2d 530 (1976) 4

State v. Royster, 48 Ohio St.2d 381, 358 N.E.2d 616 (1976) 5

State v. Staten, 18 Ohio St.2d 13, 247 N.E.2d 293 (1969) 12

State v. Strodes, 48 Ohio St.2d 113, 357 N.E.2d 375 (1976) 4

State v. Woods, 48 Ohio St.2d 127, 357 N.E.2d 1059 (1976) . . . . . passim.

Trop v. Dulles, 356 U.S. 86 (1958) 18

United States v. Bass, 404 U.S. 336 (1971) 24

United States v. Kramer, 289 F.2d 909 (2d Cir. 1961) 17

In re Winship, 397 U.S. 358 (1970) 19

Witherspoon v. Illinois, 391 U.S. 510 (1968) 18

Woodson v. North Carolina, 96 S. Ct. 2978 (1976) 9, 11, 15, 16, 18, 19

Constitution and Statutes:

United States Constitution
Sixth Amendment 1, 16, 17
Eighth Amendment 1, 16, 18, 20, 22
Fourteenth Amendment 1, 2, 19

PAGE

Ohio Rev. Code 2903.01 17
Ohio Rev. Code 2903.01(B) 2, 23
Ohio Rev. Code 2903.02 17
Ohio Rev. Code 2903.03 11
Ohio Rev. Code 2923.02(A) 2, 6, 23
Ohio Rev. Code 2929.02 17
Ohio Rev. Code 2929.03(B) 17
Ohio Rev. Code 2929.03(C) 3
Ohio Rev. Code 2929.03(D) 3
Ohio Rev. Code 2929.03(E) 3, 18
Ohio Rev. Code 2929.04(A) 2, 9, 10, 17
Ohio Rev. Code 2929.04(B) . . . . . passim.

Miscellaneous:

W. LaFAVE & A. SCOTT, CRIMINAL LAW (1972) . . 23

Lehman and Norris, Some Legislative History and Comments on Ohio's New Criminal Code, 20 CLEVE. ST. L.REV. 8 (1974) 16

Memorandum from Legislative Service Commission Staff to Criminal Law Technical Committee, January 30, 1967 23

INTEREST OF AMICUS CURIAE

The interest of Amicus Curiae, American Civil Liberties Union of Ohio Foundation, Inc., has already been stated in the attached motion.

QUESTIONS PRESENTED

(1) Whether Ohio Rev. Code §2929.04(B), as construed and applied by the Ohio Supreme Court, imposes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States by precluding the death sentencer from considering matters which, under contemporary standards of decency, must be considered in mitigation of the death penalty?

(2) Whether Ohio Rev. Code §2929.03(C) violates the right to trial by jury guaranteed by the Sixth and Fourteenth Amendments and imposes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments by precluding any jury input as to the existence of mitigating factors and the appropriateness of the death penalty?

(3) Whether Ohio Rev. Code §§2929.03(E) and 2929.04(B) violate the due process clause of the Fourteenth Amendment by placing on the defendant the burden of proving by a preponderance of the evidence that mitigating factors exist and that he should therefore not be executed?

(4) Whether the scope of review accorded death sentences by the Ohio Supreme Court is adequate, under the Eighth and Fourteenth Amendments, to insure that a death sentence is warranted by the facts of

a particular case and is proportionate to sentences imposed in similar cases?

(5) Whether the Ohio Supreme Court unforseeably interpreted and applied Ohio's law of attempt, in violation of the due process clause of the Fourteenth Amendment, when it held that "casing" the scene of a projected robbery and lying in wait for the prospective victim were encompassed by Ohio Rev. Code §2923.02(A) which defines an act of attempt as "conduct which, if successful, would constitute or result in" robbery?

INTRODUCTORY STATEMENT

Under Ohio's death sentence scheme, the death sentence is mandatory if certain conditions occur. The first condition is that the defendant must be charged with and found guilty of aggravated murder in violation of Ohio Rev. Code §2903.01 (Page 1975).[1] The second condition is that the defendant must be charged with and found guilty of one or more of the seven additional aggravating circumstances enumerated in §2929.04(A).[2]

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[1] Aggravated murder is defined as follows:
a) No person shall purposely, and with prior calculation and design, cause the death of another.
b) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

[2] The aggravating circumstances are (1) that the offense was the assassination of a specified office-holder or candidate for office; (2) that the offense was committed for hire; (3) that the offense was committed for the purpose of escaping detection, (Cont.)

Once these conditions have been met, the guilt-determining phase terminates, the jury is discharged, §2929.03(C), and the sentencing phase begins. The sentencing phase is strictly a bench proceeding; there is no jury input whatsoever. A pre-sentence investigation and psychiatric examination of the defendant are required, and the court must hear testimony and other evidence, if any. §2929.03(D). Then, §2929.03(E) calls upon the court to determine whether the defendant has established by a preponderance of the evidence, State v. Woods, 48 Ohio St.2d 127, 135, 357 N.E.2d 1059, 1065 (1976), one or more of the mitigating factors specifically enumerated in §2929.04(B).[3] If the court determines

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2/ apprehension, trial or punishment for another offense committed by the offender; (4) that the offense was committed while the offender was a prisoner in a detention facility; (5) that the offender has previously been convicted of an earlier offense the gist of which was the purposeful killing or attempted killing of another, or that the offense involved the purposeful killing of or attempt to kill two or more persons; (6) that the victim was known by the offender to be a law enforcement officer, and either (a) the victim was engaged in his duties at the time of the offense or (b) it was the offender's specific purpose to kill a law enforcement officer; and (7) that the offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary.

3/ The mitigating factors are (1) that the victim of the offense induced or facilitated it; (2) that it is unlikely that the offense would have been committed but for the fact that the offender was under duress, coercion, or strong provocation; and (3) that the (Cont.)

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that the defendant has established none of the mitigating factors by a preponderance, the death penalty is mandatory. If the court finds that one or more of the factors have been established, the death penalty is precluded and a life sentence must be imposed.

Cases in which the death sentence has been imposed are reviewable as a matter of right in the intermediate appellate court. If that court affirms the death sentence, the case is reviewable as a matter of right in the Ohio Supreme Court. Since January 1, 1974, the effective date of Ohio's new criminal code, including the death sentence statutes, more than seventy persons have been sentenced to death in Ohio. As of March 31, 1977, the Ohio Supreme Court had reviewed twenty death sentence cases. In one case, State v. James Lockett, 48 Ohio St.2d 71, 358 N.E.2d 1077 (1976), the Court set aside the conviction and sentence for evidentiary error unrelated to the penalty. In the other nineteen cases, the Court affirmed the conviction and the death sentence.[4]

3/ offense was primarily the product of the offender's psychosis or mental deficiency although such condition is insufficient to establish the defense of insanity.

4/ In order of decision, the cases are State v. Bayless, 48 Ohio St.2d 73, 357 N.E.2d 1035 (1976); State v. Strodes, 48 Ohio St.2d 113, 357 N.E.2d 375 (1976); State v. Woods, 48 Ohio St.2d 127, 357 N.E.2d 1059 (1976)(two cases); State v. Hancock, 48 Ohio St.2d 147, 358 N.E.2d 273 (1976); State v. Roberts, 48 Ohio St.2d 221, 358 N.E.2d 530 (1976); State v. Black, 48 Ohio St.2d 262, 358 N.E.2d 551 (1976); State v. Bell, 48 Ohio St.2d 270, 358 N.E.2d (Cont.)

Petitioners in the case at bar were separately tried and convicted of aggravated murder--killing another while fleeing immediately after attempting to commit aggravated robbery. The aggravating specification of which they were also found guilty was that the victim was a law enforcement officer. Petitioner Reaves was tried by a jury; Woods, by a three-judge court. After the guilt-determining phase was concluded, Petitioners were given psychiatric examinations, and the required pre-sentence report was prepared. Then a mitigation hearing was held. In each case, the bench determined that no mitigating factor had been established by a preponderance of the evidence, and each Petitioner was sentenced to death. After the convictions and sentences were affirmed in separate appeals to the intermediate appellate court, the Ohio Supreme Court consolidated the cases for review and affirmed the convictions and sentences in an opinion styled State v. Woods, supra.

In Reaves' case, the Ohio Supreme Court summarily rejected an attack on the constitutionality of Ohio's death sentence scheme,

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4/ 556 (1976); State v. Bates, 48 Ohio St.2d 315, 358 N.E.2d 554 (1976); State v. Hall, 48 Ohio St.2d 325, 358 N.E.2d 590 (1976); State v. Harris, 48 Ohio St.2d 351, 359 N.E.2d 67 (1976); State v. Royster, 48 Ohio St.2d 381, 358 N.E.2d 616 (1976); State v. Lytle, 48 Ohio St.2d 391, 358 N.E.2d 623 (1976); State v. Ferryman, 49 Ohio St.2d 14, 358 N.E.2d 1040 (1976); State v. Edwards, 49 Ohio St.2d 31, 358 N.E.2d 1051 (1976); State v. Sandra Lockett, 49 Ohio St.2d 48, 358 N.E.2d 1062 (1976); State v. Lane, 49 Ohio St.2d 77, 358 N.E.2d 1051 (1976); State v. Osborne, 49 Ohio St.2d 135, 359 N.E.2d 78 (1976); State v. Miller, 49 Ohio St.2d 198, ___N.E.2d ____ (1977).

citing its earlier decision in State v. Bayless, 48 Ohio St.2d 73, 357 N.E.2d 1035 (1976). Almost as summarily, it rejected Reaves' argument that death-scrupled, prospective jurors had unconstitutionally been excluded from the panel. 48 Ohio St.2d at 130, 357 N.E.2d at 1062. Then it summarily affirmed Reaves' death sentence, making no effort whatsoever to demonstrate that the sentence was warranted by the facts of the case or that it was proportionate to sentences imposed in similar cases. 48 Ohio St.2d at 138, 357 N.E.2d at 1066.

In Woods' case, the court below also summarily rejected a constitutional attack on Ohio's death sentence statutes. It did, however, give more extensive treatment to two other issues: whether Woods had committed attempted robbery by "casing" the scene of a projected robbery and lying in wait for the prospective victim, and whether Woods had established at the mitigation hearing that he had acted under duress.

The attempt issue involved an interpretation of Ohio Rev. Code §2923.02(A) which defines an act of attempt solely as "conduct which, if successful, would constitute or result in the offense." The Court held that the quoted words include conduct that constitutes a substantial step in a course of conduct planned to culminate in the commission of the crime, and that the "substantial step" test had been satisfied on the facts of the case. 48 Ohio St.2d at 130-32, 357 N.E.2d at 1063.

In dealing with the mitigation issue, the Court complained that it did not have the pre-sentence report, 48 Ohio St.2d at 134, n. 2, 357 N.E.2d at 1064, n.2, but nevertheless

proceeded to the merits of the issue. That issue involved an interpretation of Ohio Rev. Code §2929.04(B)(2) which precludes imposition of the death penalty when, by a preponderance of the evidence, it is established that "it is unlikely that the offense would have been committed but for the fact that the offender was under duress, coercion, or strong provocation."

At the outset, the Court recognized (1) that the most common type of aggravated murder in Ohio is felony-murder; (2) that, whether or not duress and coercion are defenses to murder in general, they are defenses in Ohio to the felony that underlies felony-murder; (3) that a felony-murder defendant who prevails on the claim of duress in Ohio is not guilty of a capital offense; (4) that, if a defendant has been found guilty of felony-murder (as he must for the offense to be capital), the verdict is necessarily a statement that, beyond a reasonable doubt, duress did not exist; (5) that such a verdict realistically precludes the defendant from establishing at the mitigation hearing that he was under duress; and (6) that, unless the terms "duress" and "coercion", as mitigating factors, were given a meaning different from their meaning as defensive factors, mitigating duress and coercion would be a "virtual nullity." 48 Ohio St.2d at 135, 357 N.E.2d at 1065. Accordingly, the Court invoked the doctrine of strict construction, and interpreted mitigating duress and coercion to mean, roughly, domination by another or undue influence. 48 Ohio St.2d at 136-7, 357 N.E.2d at 1066.

In applying its own definition, however, the Court abruptly retreated. Ignoring the evidence that Woods was easily led and

dominated by others, that he had no prior record, and that he probably would not have committed the crime had he not been under duress, 48 Ohio St.2d at 134, 357 N.E.2d at 1064, the Court held, seemingly as a matter of law, that Woods was not under duress, as newly defined, because he did not take advantage of opportunity to abandon the robbery, refrain from shooting, surrender to police, or flee. 48 Ohio St.2d at 138, 357 N.E.2d at 1066. With the failure of mitigating duress, the death penalty was mandatory, and the Court therefore affirmed the sentence.

REASONS FOR GRANTING THE WRIT

It is apparent from the Introductory Statement that Ohio's death sentence scheme, as construed and applied in the case at bar, is unlike any of the three schemes upheld by this Court last year in the second round of death penalty cases. The categories of mitigating factors recognized by Ohio Rev. Code §2929.04(B) are sparse, and the Ohio Supreme Court's application of the duress factor has been excessively narrow and restrictive; there is no jury participation in the sentencing decision; the defendant bears the burden of establishing at the mitigation hearing that he should not be executed; and the review accorded death sentences by the Ohio Supreme Court is undiscriminating, as is demonstrated by even a cursory glance at the decision below.

Resolution of these issues, however, cannot be confined to the case at bar, for what is involved is not merely how Ohio's law was applied in the isolated setting of a single case, but also the rationality, fairness, and basic decency of the entirety

of Ohio's statutory scheme as applied by the Ohio Supreme Court in a wide range of cases. Gregg v. Georgia, 96 S. Ct. 2909, 2938 (1976). A consideration of Ohio's law from this broader perspective will, we submit, reveal that, although Ohio's law is not identical to the North Carolina and Louisiana laws invalidated in Woodson v. North Carolina, 96 S. Ct. 2978 (1976); and Roberts v. Louisiana, 96 S. Ct. 3001 (1976), it affronts the very concerns underlying those cases, and therefore raises the most substantial constitutional questions.

(1) Constitutional Insufficiency of Ohio's Law of Mitigation.

Ohio Rev. Code §2929.04(B) recognizes three categories of mitigating factors. A brief consideration of each category and, where available, its judicial gloss will show that Ohio's scheme is virtually bereft of mitigation.

a) Ohio Rev. Code §2929.04(B)(1) deems mitigating that the victim of the offense induced or facilitated it. This mitigating factor has not arisen in any reported case; nor is it ever likely to arise, for it is illusory. In the absence of judicial interpretation, we must make the educated guess that the factor is limited to mercy killing, for that seems to be its plain meaning. It strains credulity to posit that a mercy killer would even be charged with aggravated murder, let alone be convicted of it. Of greater importance, however, is the fact that no mitigating factor becomes relevant until the defendant has also been convicted of one or more of the aggravating specifications listed in §2929.04(A). The aggravating circumstances, however, are so inconsistent with mercy killing, that conviction of any

aggravating specification will preclude the defendant from claiming mercy killing. To illustrate the point, we refer to §2929.04(A)(7)'s aggravating specification of felony-murder which is the most common form of aggravation under Ohio law. One who has been convicted of aggravated murder and an additional specification of felony-murder of the same victim will simply never be able to assert mercy killing. What is true of the aggravating circumstance of felony-murder is also true of the other aggravating circumstances. Hence, mitigating inducement is illusory.

b) Ohio Rev. Code §2929.04(B)(2), the section involved in the case at bar, provides for mitigation if "it is unlikely that the offense would have been committed but for the fact that the offender was under duress, coercion, or strong provocation." As is clear from our Introductory Statement, mitigating duress and coercion, as applied by the court below in the case at bar, is practically worthless. The point is buttressed by State v. Bell, 48 Ohio St.2d 270, 358 N.E.2d 556 (1976). In Bell, the Court purported to expand the definition of duress and coercion by holding that youth and absence of a prior record were relevant considerations. 48 Ohio St.2d at 281, 358 N.E.2d at 564. Then, ignoring the evidence that Bell was 16, 48 Ohio St.2d at 270, 358 N.E.2d at 559, and that he was easily influenced by his adult companion, Hall, the Court affirmed the death sentence on the ground that Bell did not get away from Hall when he could have, and that he joined Hall in another criminal venture the next day. 48 Ohio St.2d at 282, 358 N.E.2d at 364-65.

In neither Woods nor Bell did the Court even allude to the obvious: that one who is easily led or influenced by another is simply

not likely to break the relationship and escape. As applied by the court below, mitigating duress and coercion are useless. Neither concept permits the sentencer to make the kind of judgment about comparative blameworthiness that Woodson and Roberts require.

The third mitigating factor mentioned in §2929.04(B)(2) is "strong provocation." This factor has not been interpreted in any reported case, so we cannot be certain of its scope. Nevertheless, it is a fact that strong provocation cannot exist in conjunction with some of the aggravating circumstances--for example, that the killing was for the purpose of escaping detection--and it is unlikely that "strong" provocation would exist in conjunction with others--for example, killing for hire or, to refer again to the most common example, felony-murder. Beyond this, however, is the fact that, under Ohio Rev. Code §2903.03, a killing that would otherwise be murder is reduced to manslaughter if it resulted from "...extreme emotional stress brought on by serious provocation reasonably sufficient to incite [the defendant] into using deadly force..." In the absence of relevant case law, the relationship between reductive provocation and mitigating provocation cannot be illuminated. It does appear, however, that, if the Ohio Supreme Court either interprets or applies mitigating provocation narrowly, it will be swallowed up by reductive provocation and will cease to exist. Given the already narrow application of duress and coercion, that is quite likely to occur.

c) Ohio Rev. Code §2929.04(B)(3) treats as mitigating that the crime "...was primarily the product of the offender's psychosis or

mental deficiency, though such condition is insufficient to establish the defense of insanity." The question raised by this section is whether its definition of mitigating mental condition differs in any significant respect from Ohio's case law definition of insanity as a defense. If it does not, then a verdict that the defendant is guilty of capital murder, which necessarily entails a finding that he was sane, would effectively preclude the defendant from asserting this form of mitigation.

From the face of §2929.04(B)(3), it is clear that the legislature intended to distinguish mitigating from exculpating mental condition. The question, however, is not what the legislature intended, but whether it succeeded, and, if not, whether the legislative failure has been rectified by judicial interpretation and application. Ohio's insanity defense is defined as follows:

> One accused of criminal conduct is not responsible for such criminal conduct if, at the time of such conduct, as a result of mental disease or defect, he does not have the capacity either to know the wrongfulness of his conduct or to conform his conduct to the requirements of the law.

State v. Staten, 18 Ohio St.2d 13, 247 N.E.2d 293 (1969)(syllabus 1). This definition surely suggests no easy differentiation from mitigating mental condition (whether the crime "was primarily the product of the offender's psychosis or mental deficiency"). Thus, if there is any difference between them, it must reside in Ohio's case law.

The Ohio Supreme Court has dealt with mitigating mental condition in five capital cases. It would unduly prolong this brief to discuss each of the cases in detail. Suffice it to say, therefore, (1) that the Court has read the mitigating condition narrowly by recognizing that it does not cover all mental disorders and by limiting "mental deficiency" to low intelligence or retardation, State v. Bayless 48 Ohio St.2d at 87, 95-6, 357 N.E.2d at 1046, 1050-51 (thus blurring the distinction between mitigation and exculpation), while, in the very next case, reading the same language expansively to accord the sentencer "the broadest possible latitude" by holding that "any mental state or incapacity may be considered" short of the defense of insanity. State v. Black, 48 Ohio St.2d at 268, 358 N.E.2d at 555-56; (2) that the Court has compounded confusion by explicitly refusing to define "psychosis or mental deficiency" on the ground that "to define such terms is to narrow them," ibid., thus abandoning sentencers on an uncharted sea that most conduces to the freakish or wanton imposition of the death penalty; (3) that the Court has stated that the defendant's youth is a "primary factor" in determining "mental deficiency" (without indicating how that could possibly be the case), while simultaneously upholding a death sentence imposed on a 16 year old offender, State v. Bell, 48 Ohio St.2d at 270, 282, 358 N.E.2d at 559, 565; see also State v. Harris, 48 Ohio St.2d 351, 359 N.E.2d 67 (1976)(death sentence imposed on juvenile sociopath); and (4) that, its expansiveness in State v. Black, supra, notwithstanding, the Court has upheld the death sentence in every case in which mitigating mental condition was raised. See cases cited supra, and State v. Edwards, 49 Ohio St.2d 31, 358 N.E.2d 1051 (1976).

Taken as a whole, the Court's cases either fail to draw any distinction between mitigation and exculpation, thus rendering mitigation illusory, or so confound matters that the mitigating condition cannot be applied even-handedly as a result of the very gloss that the Court has given it.

d) Ohio Rev. Code §2929.04(B) requires the sentencer to determine whether, "considering the nature and circumstances of the offense and the history, character, and condition of the offender," a statutory mitigating factor has been established by a preponderance of the evidence. Under cover of the quoted words, the Ohio Supreme Court has stated, as indicated above, that the defendant's youth is relevant to determining mitigating duress, coercion, or mental condition; that absence of a prior record is relevant to the determination of duress and coercion, and that duress includes undue domination by another. That these statements are insubstantial (perhaps cosmetic) is indicated by the following: (1) none of the additional factors (youth, etc.) has relevance independent of the statutory factors; (2) in no case has the Court even tried to explain how youth or absence of a record might be relevant to any of the statutory factors; (3) in no case has the Court set aside a death sentence where the defendant was young or had no prior record or acted under the influence of another. Thus, the illusory nature of the statutory factors cannot be overcome by reference to additional factors.

e) It is apparent from the description of Ohio's capital-sentencing system, as interpreted and applied by the Ohio Supreme

Court, that the statutory mitigating factors are illusory or intolerably narrow at best; that this profound deficiency cannot be remedied by resorting to additional mitigating factors; and that the sentencer in Ohio is therefore precluded from considering matters which, in many other states, would serve to mitigate the death penalty. Because "...the penalty of death is qualitatively different from a sentence of imprisonment, however long...there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, supra at 2992. Ohio law does not permit a reliable determination of the appropriateness of the death penalty. Although Ohio's law is not identical to the invalidated laws of North Carolina and Louisiana, Amicus submits that it is too close to survive constitutional scrutiny. The matter is, of course, one of degree. But it is also one of life or death.

Amicus is aware that this Court has recently heard argument in Roberts v. Louisiana, #76-5206 (Roberts II), which involves, as does the case at bar, the killing of a police officer. As the facts of the case at bar dramatically illustrate, however, even those who jointly participate in the killing of a police officer may not be blameworthy in the same degree. Hence, Amicus would urge this Court not to depart, in deciding Roberts II, from its holdings in Woodson and Roberts I. Should this Court, however, choose to create a special rule for the killing of a police officer, that would still not control the outcome of the case at bar, for the instant case involves important constitutional issues in addition to the sufficiency of Ohio's law of mitigation.

(2) Preclusion of Jury Participation in the Capital-Sentencing Process.

Prior to Furman v. Georgia, 408 U.S. 238 (1972), the capital-sentencing decision in Ohio was entrusted solely to the jury unless the defendant waived trial by jury on the merits, in which event both trial and sentencing were handled by a three-judge court. Believing that compliance with Furman precluded jury sentencing, see Lehman and Norris, Some Legislative History and Comments on Ohio's New Criminal Code, 23 CLEVE. ST. L.REV. 8, 16-17, 20 (1974), a judgment that was proved wrong by Gregg v. Georgia, 96 S. Ct. 2909 (1976), the Ohio legislature enacted §2929.03(C) which remits the sentencing decision to one or three judges, depending on whether or not guilt was determined by a jury, and bars even advisory participation by the jury.

In the pre-Furman era, jury participation in the capital-sentencing process was so deeply rooted as to be axiomatic. See Woodson v. North Carolina, supra at 2985. Although this Court "has never suggested that jury sentencing is constitutionally required," Proffitt v. Florida, 96 S. Ct. 2960, 2966 (1976), and has opined that judicial sentencing should lead to greater consistency, ibid., it has neither considered nor approved any post-Furman death penalty statute that totally excluded the jury. Even the Florida statute sustained in Proffitt wrought but a limited encroachment upon the tradition that only a jury may impose a death sentence. Id. at 2965. By contrast, Ohio's statute bars even advisory participation by the jury, and therefore raises substantial Sixth and Eighth Amendment questions.

From a Sixth Amendment perspective, it is clear that the kinds of issues raised at an Ohio mitigation hearing are well within the traditional role of juries in criminal cases. Inducement by the victim is comparable to the substantive issue of consent; duress, coercion and provocation have defensive or reductive counterparts; and mitigating mental condition is analogous to the defense of insanity. In terms of issues, therefore, there is no justification for barring jury participation in the determination of sentence.

Under Ohio's scheme, issues of aggravation go to the merits. Ohio Rev. Code §2929.03(B) and (C). Consequently, they are, and must be, jury triable. Yet, aggravation and mitigation are, in Ohio, really reverse sides of the same coin: determining whether the offense is non-capital murder, in which event the death penalty is precluded, or whether it is capital, in which event the death penalty is mandatory. In effect, Ohio law recognizes the following gradations of murder: simple murder (§2903.02), punishable by fifteen years to life (§2929.02); aggravated murder (§2903.01), punishable by life imprisonment (§2929.02); doubly aggravated murder (§§2903.01 and 2929.04(A)) with a mitigating factor (§2929.04(B)), also punishable by life imprisonment (§2929.02); and capital murder, i.e., doubly aggravated murder without any mitigating factor, for which the death penalty is mandatory. Once this structure is recognized, it becomes clear that issues of mitigation actually go to the degree of guilt, with preclusive or mandatory consequences on sentence, and that the issues should be jury triable under the Sixth Amendment. See United States v. Kramer, 289 F.2d 909, 921 (2d Cir. 1961).

From an Eighth Amendment perspective, it is clear that determining the validity of capital-sentencing statutes crucially involves "ascertaining contemporary standards of decency." Woodson v. North Carolina, supra at 2987. In Witherspoon v. Illinois, 391 U.S. 510, 519, n. 15 (1968), this Court, citing the Eighth Amendment case of Trop v. Dulles, 356 U.S. 86, 101 (1958), observed that "...one of the most important functions any jury can perform...is to maintain a link between contemporary community values and the penal system--a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'" Although that observation was made in the context of a system of uncontrolled jury discretion, it is also vital where discretion is controlled. See Gregg v. Georgia, supra at 2933. Ohio's law does not reflect a legislative judgment to the contrary, even if such a judgment were permissible. As noted above, the Ohio legislature apparently believed that compliance with Furman precluded jury participation of any sort. That judgment, proved erroneous by Gregg, now raises substantial constitutional questions which should be resolved by this Court.

(3) Unconstitutionality of Allocating Burden of Proof to Defendant.

Ohio Rev. Code §§2929.03(E) and 2929.04(B) force the defendant to establish by a preponderance of the evidence one or more of the mitigating factors enumerated in §2929.04(B). State v. Woods, 48 Ohio St.2d at 135, 357 N.E.2d at 1065. The Ohio Supreme Court has summarily upheld the constitutionality of this procedure. State v. Sandra Lockett, 49 Ohio St.2d at 65-66, 358 N.E.2d at 1074. In

In re Winship, 397 U.S. 358 (1970), this Court interpreted the due process clause in a criminal case to require allocation to the prosecution of the burden of proving beyond a reasonable doubt every essential element of guilt. As we have argued in Point 2, supra, mitigation does go to the question whether the defendant is guilty of capital murder. Hence, under Winship the state should be required to bear the burden. But the result would be no different even if mitigation were regarded as going solely to punishment, for the reach of the Winship rule was broadened in Mullaney v. Wilbur, 421 U.S. 684 (1975), when this Court invalidated a Maine procedure which placed on the defendant the burden of proving by a preponderance the existence of provocation to reduce murder to manslaughter. In most states, provocation is an element, and the prosecution must negate it beyond a reasonable doubt to sustain a murder charge. In Maine, however, provocation was not an element; there was but a single generic offense of voluntary criminal homicide, and the labels "murder" and "voluntary manslaughter" described only "punishment categories." Id. at 689; see also id. at 688, 691, 699. Even though provocation was not an element under Maine law, this Court held that Winship was applicable given the disparity in sentences for murder and manslaughter and the consequent importance of reliably determining the applicable category. Id. at 700-01. This Court regarded it as "intolerable," id. at 703, to impose a more severe sentence on the defendant "...when the evidence indicates that it is as likely as not that he deserves a significantly lesser sentence." Ibid. (Emphasis added.) In Woodson v. North Carolina, supra at 2992, this Court recognized the qualitative difference between a death sentence and any sentence to imprisonment. Under Ohio's burden of proof, a

defendant can be killed when the evidence indicates that it is as likely as not that he deserves to live, although in a prison. For sheer intolerability, this beggars the concern that was voiced in Mullaney. Amicus respectfully suggests that Ohio's burden of proof raises a most serious constitutional question.

(4) Eighth Amendment Adequacy of Scope of Review by Ohio Supreme Court.

Plenary review of death sentences by a state's highest court--the only court with statewide jurisdiction--is an important procedural safeguard against the arbitrary and capricious imposition of the death penalty, Gregg v. Georgia, supra at 2937, for it helps to insure not only that the death penalty is appropriate when measured by the facts of a particular case, but that it is proportionate to sentences imposed in similar cases. Although death-sentence cases are reviewable as a matter of right in Ohio's appellate courts, including the Ohio Supreme Court, it was generally believed in the pre-Furman era that no Ohio reviewing court had the authority to set aside a death sentence as excessive or inappropriate. See McGautha v. California and Crampton v. Ohio, 402 U.S. 183, 195, n. 7 (1971). However, in State v. Bayless, supra at 86, 357 N.E.2d at 1045, the Ohio Supreme Court stated that it would "independently review the aggravating and mitigating circumstances presented by the facts of each case to assure ourselves that capital sentences are fairly imposed by Ohio's trial judges." That the Court has not kept its promise with fidelity to Eighth Amendment values is strongly suggested by the following:

a) In State v. Edwards, supra at 47,

358 N.E.2d at 1062, the Court, citing a pre-Furman capital case, State v. Cliff, 19 Ohio St.2d 31, 249 N.E.2d 823 (1969), explicitly stated that "in criminal appeals this court will not retry issues of fact [relating to mitigation]. In the circumstances at hand, we confine our consideration to a determination of whether there is sufficient substantial evidence to support the verdict rendered." The "substantial evidence" test in Ohio, however, as State v. Cliff, supra, makes clear, is an inordinately narrow test, for the verdict or sentence will be sustained under it unless no reasonable mind could reach the same conclusion. Whatever the merits of the "substantial evidence" test as a device for appellate review in non-capital cases, it surely does not suffice in capital cases to insure that the death penalty is appropriate when measured by the facts of a particular case, especially when the burden of proving mitigation is on the defendant. In stark contrast to Ohio's procedure is the Florida procedure sustained in Proffitt, supra at 2966, "under which the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida" (emphasis added).

b) In none of the nineteen cases in which the Ohio Supreme Court has sustained the death sentence has it even attempted to compare the case with any other case in which the death sentence was imposed or with any case in which the death sentence was averted.

c) In several cases, as indicated earlier, the Ohio Supreme Court has purported to interpret various mitigating factors broadly for the benefit of the defendant. These expansive readings could hardly have

been anticipated by the trial judges who imposed the death sentence, and it is likely that they used narrower standards in holding that mitigation had not been proved. Despite this, the Ohio Supreme Court has not remanded a single case for a new sentencing hearing to be conducted pursuant to the newly articulated standards. Rather, in every case, the Court has simply reviewed the record as made, without even inquiring whether the standards used by the sentencer were compatible with the standards thereafter announced.

d) As noted in the Introductory Statement, the Ohio Supreme Court, in the case of Petitioner Woods, while complaining that it had not received the presentence report, proceeded to review the record without it, and affirmed the death sentence. The impropriety of this practice is strongly suggested by Gardner v. Florida, 45 U.S. L.WEEK 4275 (U.S. March 22, 1977).

e) In Proffitt v. Florida, supra at 2967, this Court observed that the Florida Supreme Court had set aside the death sentence in eight of twenty-one cases, thus evidencing scrupulous appellate review. The Ohio Supreme Court has reviewed twenty death-sentence cases. It has set aside the conviction and sentence in one for evidentiary error unrelated to the penalty. In each of the nineteen remaining cases, however, it has affirmed the death sentence.

Whether Ohio's system of appellate review is adequate to comply with Eighth Amendment standards is a substantial constitutional question which should be resolved by this Court.

(5) Retroactive Application of Ohio Law of Attempt.

The convictions and death sentences in the case at bar rest importantly on the allegation that the killing occurred while the Petitioners were fleeing immediately after attempting to commit robbery. Ohio Rev. Code §2903.01(B). In Ohio, as elsewhere, an attempt comprises an act coupled with a mental element. Ohio Rev. Code §2923.02(A). Various tests have been used to determine whether an "act of attempt" occurred. The narrowest test, most favorable to a defendant, is the "last proximate act" test which requires that the defendant "have done everything which he believes necessary to bring about the intended result." W.LaFAVE & A.SCOTT, CRIMINAL LAW 433 (1972). A much broader test, much less favorable to a defendant, is the "substantial step" test which asks whether the defendant's conduct was a substantial step in a course of conduct planned to culminate in the crime. Id. at 436. Ohio Rev. Code §2923.02(A) defines an act of attempt exclusively as "conduct which, if successful, would constitute or result in the offense." The plain meaning as well as the drafting history of this section leave no doubt that the quoted words describe the "last proximate act" test and not the "substantial step" test. Memorandum from Legislative Service Commission Staff to Criminal Law Technical Committee (the drafting committee), January 30, 1967, pp. 7, 14.

In the case at bar, the defendants "cased" the scene of a projected robbery and lay in wait for the prospective victim. It is arguable that their conduct constituted a "substantial step". It is beyond argument that their conduct did not constitute the "last proximate act". See Memorandum, supra

at 14. The Ohio Supreme Court, however, abandoned the doctrine of strict construction and its underlying policy of fair warning, United States v. Bass, 404 U.S. 336, 348 (1971), totally ignored both plain meaning and legislative history, interpreted the statute broadly in favor of the State, held that it encompassed the "substantial step" test, and applied that test retroactively to the case at bar. State v. Woods, supra at 130-32, 357 N.E.2d at 1063. Although that holding, insupportable though it may be, now states the law of Ohio, its retroactive application to the case at bar raises a substantial due process question. See Bouie v. City of Columbia, 378 U.S. 347, 362-63 (1964).

CONCLUSION

For the foregoing reasons, Amicus respectfully submits that the Petition for a Writ of Certiorari should be granted.

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